APPENDIX A

SUPREME COURT OF THE UNITED STATES

KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
No. 593. Decided January 17, 1966.

PER CURIAM.

On March 11, 1964, pursuant to a transfer order issued by the Court of Appeals for the Fifth Circuit, the United States District Court for the Northern District of Oklahoma entered an order temporarily restraining respondents from proceeding with trial of a case in the Mississippi state courts. When respondents, in disregard of the temporary restraining order, proceeded to trial in Mississippi, the District Court on March 14 found them in civil contempt.[1] Undeterred, respondents pressed the state court action to a conclusion and obtained a judgment against petitioner on April 8. But the District Court, on September 1, enjoined respondents from seeking to enforce the Mississippi judgment, required them to compensate petitioner for reasonable expenses in connection with the contempt proceeding, reserved decision as to whether they must also reimburse petitioner for expenses relating to the Mississippi litigation, and ordered the civil suit between the parties retried—this time in Oklahoma and in federal court.

Respondents appealed from this decree to the Court of Appeals for the Tenth Circuit which reversed, holding

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[1] Criminal contempt charges were also filed, but are not involved in the present petition.

that at the time the District Court had entered the original restraining order it was without jurisdiction since it had not yet received the case file from the transferor court. We are asked to review that determination. We grant the petition and reverse.

The District Court had assumed jurisdiction of the cause and entered its restraining order on March 11, five days before the papers in the case were transferred to it from Mississippi. It acted upon the basis of a certified copy of an order entered the previous day by the Court of Appeals for the Fifth Circuit. That order provided not only that the District Court for the Southern District of Mississippi had erred in failing to comply with an earlier appellate mandate to transfer the case, but also that "pending the entry of the order of transfer by the District Judge and the physical filing of the record in Oklahoma, this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

Although a federal appellate court does not ordinarily itself transfer a case to another district, but remands to the District Court for that purpose,[2] the extraordinary action in this case was taken as a result of extraordinary circumstances. These included the fact that the Federal District Court in Mississippi had granted a motion to dismiss despite instructions from the Fifth Circuit to transfer the cause to Oklahoma,[3] and the further fact

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[2] Cf. *Platt* v. *Minnesota Mining Co.*, 376 U. S. 240 (under Rule 21(b) of the Federal Rules of Criminal Procedure).

[3] The Fifth Circuit suggests that the District Court's action was the result of misunderstanding over whether an answer had been filed and hence of its duty to grant a voluntary dismissal under Rule 41(a)(1) of the Federal Rules of Civil Procedure, rather than the result of unreadiness to respect appellate instructions.

that a duplicative action in the Mississippi state courts brought by respondent Hyde Construction Company was to commence, and did in fact commence, on March 11—one day after the Fifth Circuit's *instanter* transfer and the very day on which the Federal District Court in Oklahoma entered its order.

In the special circumstances of this case, we conclude that the District Court in Oklahoma had acquired jurisdiction on March 11 in accordance with the Fifth Circuit's order for *instanter* transfer and that the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground. We do not read 28 U. S. C. § 1404(a), providing that "a district court may transfer any civil action," as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order.[4]

Accordingly, we grant the petition, reverse the judgment, and remand to the District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions.[5]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

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[4] *Drabik* v. *Murphy*, 246 F. 2d 408 (C. A. 2d Cir.), is not authority for the proposition that the transferee court fails to acquire jurisdiction until papers are received from the transferor court. On the contrary, *Drabik* suggests that the transferor court may lose jurisdiction before that event.

[5] This reservation was made in the opinion of the Fifth Circuit.

I think, as shown by the record and the carefully prepared opinions of the able judges in both the Fifth and the Tenth Circuits, that the circumstances of this case are both too complex and obscure, and the issues which concern among other things the relationship between state and federal courts and the transfer of cases between federal courts are all too important to be treated in the cursory manner the Court does here. This Court's reversal of the judgment below, without giving respondents any opportunity for oral argument to support the thoroughly considered opinion and holding of the Tenth Circuit, seems more extraordinary to me than what the Court's *per curiam* opinion refers to as the "extraordinary circumstances" in the courts below. I dissent from that course of action taken by this Court.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

KOEHRING COMPANY, *Petitioner,* vs. HYDE CONSTRUCTION COMPANY, INC., ET AL., *Respondents.*	No. 593

RESPONDENTS' PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, respectfully petition the Court for rehearing of the decision and judgment in this cause and move the Court to amend the order remanding the case to the District Court for the Northern District of Oklahoma, to the end that the case may be remanded to the Court of Appeals for the Tenth Circuit for completion by that Court of its appellate review processes in the light of this Court's decision and judgment, and for grounds state the following:

1.

The only issue decided by the Court of Appeals was the transfer-jurisdictional issue, and this single threshold issue was the sole issue involved in the question presented to and decided by this Court on the writ of certiorari.

2.

Several additional points were specified, briefed and argued in the Court of Appeals, presenting serious issues

vitally affecting or dispositive of the case under review. Such issues were not reached or decided by the Court of Appeals, but were pretermitted by that Court in view of its ruling on the threshold jurisdictional decision.

3.

The Court of Appeals has not completed its appellate function of reviewing the judgment of the District Court on the basis of the record and the points specified, briefed and argued before that Court, and the review process cannot be completed if the Court of Appeals is by-passed by remanding the case to the District Court, except upon a subsequent appeal attended by unnecessary expense and delay.

WHEREFORE, Respondents respectfully pray that they be afforded a re-hearing for the purpose of presenting the grounds outlined above, and Respondents respectfully move the Court to amend its order or mandate to the extent of directing that the cause be remanded to the Court of Appeals for the Tenth Circuit for further proceedings and appellate review in that Court, and in support hereof Respondents submit the sub-joined brief.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 593 — October Term, 1965

Koehring Company,
Petitioner,
v.
Hyde Construction Company, Inc., et al

The petition for rehearing and motion to amend order of remand are denied.

March 7, 1966

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYDE CONSTRUCTION COMPANY, INC., Plaintiff, vs. KOEHRING COMPANY, and C. S. JOHNSON COMPANY, et al, Defendant	CIVIL ACTION No. 5911

AMENDED AND SUPPLEMENTAL MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER OF CIVIL CONTEMPT AND TO DISMISS CAUSE

Now comes Hyde Construction Company, Inc., and without waiver of its objections to jurisdiction and venue or of its original or its amended and supplemental motion to transfer the case back to the Court in which it originated, respectfully moves the Court to dissolve the injunction imposed by this Court's order of September 1, 1964, against proceedings of the State Courts of Mississippi for collection of the Judgment against Koehring Company in Cause No. 60,068 in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and in Cause No. 43,572 in the Supreme Court of Mississippi, and to vacate its order in civil contempt, and to dismiss this cause without prejudice, and for grounds would show:

1.

Since the injunction against collection was issued, the Decree of the Chancery Court of Hinds County, from

which the Koehring Company appealed, has been affirmed (as modified) and a final judgment has been entered by the Supreme Court of the State of Mississippi.

2.

The Supreme Court of Mississippi, on the appeal of the Koehring Company, has adjudicated finally: (1) That the Chancery Court acted only on purely in personam aspects of the case; and (2) That the State Courts had jurisdiction of the parties and subject matter; and (3) That the State Courts had the right and duty to proceed and to enter the final judgment in personam on the merits of the case.

3.

The judgment of the Supreme Court of Mississippi is entitled to full faith and credit in the Courts of the United States under 28 U.S.C. 1738 and under the Constitution of the United States (Art. IV, Section 1), and under the law of the land.

4.

The State judgment is final and fully enforceable and in res judicata under the laws of the State of Mississippi, and is entitled to be allowed the same effect in all other Courts and jurisdictions under the full faith and credit doctrine.

5.

The injunction against collection is an injunction to stay proceedings of a State Court contrary to 28 U.S.C. 2283.

6.

The State Chancery Court dealt only with the purely in personam aspects of the controversy between the liti-

gants. The order to stop the proceedings on the motion of the Koehring Company was erroneous, if not wholly void, as to such in personam aspects of the proceedings, and cannot support sanctions in favor of the moving litigant in civil contempt.

7.

This cause has been tried on its merits at great expense. The resulting Judgment has become a property right vested in Hyde Construction Company, Inc. and its assigns. For these and other reasons apparent, the withholding of full faith and credit from the judgment in Movant's favor on the merits would be to deprive it of its property without due process of law, contrary to equity and law and to the Constitution of the United States.

8.

The case was fully and fairly tried in the State Courts. The Koehring Company did not withdraw from the State Court proceedings in reliance upon the restraining order of this Court, and did not elect to remove the case to the Federal Court, but invoked the jurisdiction of the State Courts and fully participated in those proceedings. Wherefore, the Koehring Company is now estopped from asserting, by collateral attack, any alleged rights contrary to or at variance with the adjudication and judgment resulting from such proceedings.

9.

This Court was without jurisdiction because the case had been dismissed by notice under Rule 41 of the Federal Rules of Civil Procedure, which notice was recognized as effecting a dismissal by the order of the United

States District Court for the Southern District of Mississippi prior to the transfer order of Judge Brown of the Fifth Circuit.

This motion is based upon the record now on file and in further support hereof, Movant attaches hereto and incorporates herein, by reference, the following exhibits: (A) The Complaint in Cause No. 60,068; (B) the Answer of Koehring Company in Cause No. 60,068; (C) the Final Decree of the Court in Cause No. 60,068; (D) the Notice of Appeal to the Supreme Court of Mississippi and Appeal Bond in Cause No. 60,068; (E) the Assignments of Error on Appeal; (F) the Motion of Appellee to Dismiss the Appeal; (G) the initial Opinion of the Supreme Court and Judgment thereof; (H) the Suggestions of Error by Appellant; (I) the Motion of new counsel for leave to file a brief on Suggestion of Error; (J) the Motion of Appellee to Correct Judgment; (K) the Opinion of the Supreme Court of Mississippi overruling Suggestions of Error; (L) the Opinion of Supreme Court of Mississippi on Motion to Correct Judgment; and (M) the Final Judgment of Supreme Court of Mississippi, dated February 7, 1966: all authenticated according to the Acts of Congress.

Specifically in support of Item No. 8 above, and generally, to the extent applicable, in support of all other items hereof, Movant files herewith and incorporates herein by reference a complete transcript of the pleading, orders, findings, opinions, testimony, evidence, exhibits and proceedings filed and developed in the Chancery Court of the First Judicial District of Hinds County, Mississippi, in Cause No. 60,068, and in the Supreme Court of Mississippi on appeal in Cause No. 43,572, all authenticated according to the Acts of Congress, except

only that certain bulky exhibits, movie films and physical objects sent to and now on file in the Supreme Court of Mississippi in original form, as more particularly identified by the list included in the Certificate of the Clerk of the Supreme Court and on the copy of the Motion hereinafter referred to, are not physically filed contemporaneously with the filing of this Motion, but are incorporated herein by reference, subject to later physical filing when the same become available to Movant.

As to said omitted exhibits in original form, a Motion for leave to withdraw said exhibits has been filed with the Supreme Court of Mississippi and served on counsel for the Koehring Company, copy of which said Motion is hereto attached, and Movant represents that unless counsel for the Koehring Company objects or the Court refuses leave to withdraw said original exhibits, the same will be withdrawn by Movant and filed with the Clerk in this cause as a part of Exhibit N hereto, all to the end that this Court may be fully apprised of all matters, facts and things which were before the Courts in said Chancery Cause No. 60,068 and Supreme Court Cause No. 43,572. Said transcript filed contemporaneously herewith and the exhibits hereafter to be filed will be collectively referred to as Exhibit N to this Motion.

Respectfully submitted,

/s/ Charles Clark
CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

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DAVID H. SANDERS
205 Denver Building
Tulsa, Oklahoma
ATTORNEYS FOR PLAINTIFF

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYDE CONSTRUCTION COMPANY, INC., Plaintiff, vs. KOEHRING COMPANY, and C. S. JOHNSON COMPANY et al., Defendant.	Civil Action No. 5911 FINDINGS OF FACT AND CONCLUSIONS OF LAW

An amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause, having been heard before the Court on April 8, 1966, all of the parties appearing by counsel, and the briefs having been read and arguments of counsel having been heard and the Court having been fully advised in the premises, it is hereby decided and found as follows:

FINDINGS OF FACT

1. On September 1, 1964, this Court in a civil contempt proceeding issued an order providing among other things that the above captioned case be tried in this Court as if Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, had not been tried and as if the judgment therein had not been rendered.

2. This order was appealed to the U. S. Court of Appeals for the 10th Circuit by Plaintiff. The Court of Appeals in part reversed this Court's ruling.

3. Defendant filed a petition for certiorari to the U. S. Supreme Court. The U. S. Supreme Court granted certiorari, reversed the ruling of the Court of Appeals and remanded the action to this Court.

4. Plaintiff petitioned the U. S. Supreme Court for a rehearing, alleging that the case should instead be remanded to the U. S. Court of Appeals for the 10th Circuit. This petition for rehearing was denied and the case was remanded to this Court.

CONCLUSION OF LAW

To grant this motion would frustrate the September 1, 1964 order of this Court as affirmed by the U. S. Supreme Court and, therefore, the motion is overruled.

Dated this 24th day of April, 1966.

Allen E. Barrow
United States District Judge

[SEAL]

APPENDIX E (Cont'd)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORDER

On April 8, 1966, the following four motions of Plaintiff came on for hearing: (1) Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause; (2) Amended and Supplemental Motion to Transfer Back; (3) Motion in Reference to Defendant's Notice to Take Depositions; and (4) Motion for Leave to File An Amended and Supplemental Answer to Defendant's Counterclaim and Amended Counterclaim. The Court, having studied the briefs and heard oral argument,

ORDERS that Plaintiff's Motions (1), (2), and (3) be, and are overruled;

ORDERS that Plaintiff's Motion (4) be, and is granted and Defendant is granted leave, within 10 days after the filing of Plaintiff's Amended and Supplemental Answer, to move to strike the same; and

FURTHER ORDERS that Defendant's attorneys prepare Findings of Fact and Conclusions of Law in accordance with the views expressed by the Court.

DATED, this 18th day of April, 1966.

s/ Allen E. Barrow
United States District Judge

(SEAL)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYDE CONSTRUCTION COMPANY, INC., Plaintiff, vs. KOEHRING COMPANY, ET AL, Defendants.	CIVIL ACTION No. 5911

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Hyde Construction Company, Inc., Plaintiff and Appellant in the above styled and numbered action, hereby appeals to the Court of Appeals for the Tenth Circuit from the Judgment entered on April 18, 1966 in favor of the Defendants and Appellees herein, Koehring Company and C. S. Johnson Company, declining to dissolve the existing injunction and denying other relief sought by Plaintiff.

THIS 21st day of April, 1966.

HYDE CONSTRUCTION COMPANY, INC.

BY s/ Jack N. Hays
JACK N. HAYS
Attorney
310 Beacon Building
Tulsa, Oklahoma

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HYDE CONSTRUCTION COMPANY, INC., Appellant, vs. KOEHRING COMPANY, Appellee.	No. 8717 MOTION TO DISMISS APPEAL

Appellee, Koehring Company, moves this Court of Appeals for an order dismissing the appeal docketed by Hyde Construction Company, Inc. on April 22, 1966 and remanding the action to the United States District Court for the Northern District of Oklahoma.

The basis for this motion is that the appeal is frivolous. Further, this Court of Appeals ought not to entertain the appeal because the United States Supreme Court, after denying a motion by Appellant to remand the action to this Court, has heretofore remanded the action to the United States District for the Northern District of Oklahoma.

Dated this 6th day of May, 1966.

Respectfully submitted,

OF COUNSEL:
A. Morgan Brian, Jr.
Villard Martin, Jr.

Maurice J. McSweeney
s/ William A. Denny
ATTORNEYS FOR APPELLEE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH JUDICIAL CIRCUIT
SITTING AT DENVER, COLORADO
NINTH DAY, JULY TERM,
WEDNESDAY, JULY 27th, 1966.

PRESENT: Honorable Orie L. Phillips,
Circuit Judge,

Honorable Jean S. Breitenstein,
Circuit Judge,

And other officers as noted on the
14th day of July, 1966.

Before Honorable David T. Lewis, Honorable
Jean S. Breitenstein and Honorable Oliver Seth,
Circuit Judges.

Hyde Construction Company, Inc., Appellant, 8717 vs. Koehring Company et al., Appellees.	Appeal from the United States District Court for the Northern District of Oklahoma.

This cause came on to be heard on the motion of appellees to dismiss the appeal herein.

On consideration whereof, it is ordered that the said motion be and the same is hereby denied.